SUPREME COURT, U. S.

FILED

MAR 20 1975

No. 74-206

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

CITY OF PARMA, OHIO, Petitioner

vs.

UNITED STATES OF AMERICA, et al., Respondents

On Petition for a Writ of Certiorari, Mandamus, or Common Law Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER

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SUPREME COURT of the UNITED STATES

October Term, 1974

No. 74-900

CITY OF PARMA, OHIO, Petitioner

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REPLY BRIEF OF PETITIONER

One of the implicit, underlying issues to be decided by the Court in this case is whether the Federal Rules of Civil Procedure are a liberating force in the quest for justice or a trap which no amount of professional acumen can avoid.

In the district court, petitioner filed a compulsory counterclaim which sought to enjoin enforcement of the Fair Housing Act for being repugnant to the Constitution on its face or as applied to municipalities. Petitioner claims that under our federalism the Attorney General has no

constitutional right to usurp local-government functions in the guise of enforcing that Act, or to interfere with the precious right to vote on local issues, or to divert the F.B.I. from its proper activities (such as apprehending the elusive Weathermen terrorists) by ordering its agents to question the motivation of housewives engaged in participatory democracy.

Petitioner sought to enjoin such ultra vires activity of the Attorney General's employees against municipalities - not just to defeat the present action. Otherwise, the Attorney General could bring repeated actions: whenever a builder does not get away with failing to conform to local building and zoning ordinances and someone cries "discrimination". No municipality of Parma's size and limited resources could stand the financial burden of repeated defenses against the seemingly limitless tax-supplied resources of the Department of Justice.

Rule 13(a), F.R. Civ. P., mandated that Parma present its claim for injunctive relief as a compulsory counterclaim in the same suit filed by the Attorney General. Had Parma sued in a separate action and the district court refused to convene a three-judge court, and dismissed the action, there is no doubt Parma could have appealed to the Court of Appeals. Gonzalez v. Automatic Employees Credit Union, _____ U.S. _____, 95 S. Ct. 289, 43 L.W. 4025 (1974).

It was Rule 8 and Rule 13(a) which required Parma to denominate its claim for relief a "counterclaim", and Rule 13 which mandated that it must be filed in the action, brought by the Attorney General, which ripened Parma's claim into an Article III case or controversy.

Respondents' Citations are Inapposite

No case is cited by the Solicitor General which has decided the constitutional issues raised by Parma. This Court has not yet ruled on the constitutionality of interferring with such purely local-government functions as enforcing building and zoning restrictions. Thus, it cannot be said that the constitutional issues raised by Parma are insubstantial.

Respondents' reliance on Western Geophysical Co. of America, Inc. v. Bolt Associates, Inc., 463 F.2d 101 (2nd Cir. 1972) is misplaced, for it is distinguishable from our case. Here only one counterclaim, rather than several, is involved. The prior decision in Western Geophysical, at 440 F.2d 765, 770, clearly held that "only one counterclaim seeking injunctive relief ... would have been appealable under 28 U.S.C. § 1292 (a)(1)." In Ambercrombie & Fitch Co. v. Hunting World, Inc., 461 F. 2d 1040, 1042 (2nd Cir. 1972), the same Court of Appeals held that the rationale of Western Geophysical "was that no single counterclaim had been dismissed in its entirety and that the full extent of injunctive relief prayed for by the defendant could still be secured in each of its counterclaims'. Here, there is only one compulsory counterclaim involved - a claim for injunctive relief filed because Rule 13(a) required it to be filed herein rather than as a separate suit. It is a genuine counterclaim and not merely a defense, for it seeks an injunction against future attempts to misuse the Fair Housing Act and not just to defeat the Attorney General's action (which should be defeated because it lacks merit even without reaching the constitutional issues). As stated in footnote 3, 463 F.2d at 104, this case presents the opportunity to reconsider General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932) and to instruct the lower courts to

follow the proper procedure in a case such as this. Surely a litigant compelled to present a claim for injunctive relief as a compulsory counterclaim should not fare worse than a litigant who presents the same claim by an independent action. Either the compulsory counterclaim rule should not apply or the Court of Appeals should be required to hear the appeal under 28 U.S.C. § 1292 (a)(1).

Finally, in the present action, neither the Attorney General nor the Secretary of HUD need personally appear at the deposition; Rule 30 (b)(6) specifically permits each to select "designees". But if attorneys conduct the "investigation" of a potential defendant, then they are just as subject to being deposed concerning facts as are city officials, and they are not rendered immune by also conducting the litigation. The two functions can easily be divided among the Attorney General's staff rather than being merged so as to prevent needed discovery - if the trial is to be a serious search for truth and not a means of suppressing evidence unfavorable to the Attorney General.

Petitioner's petition involves substantial issues of national importance and warrants the granting of review.

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